SUPREME COURT, U. S.

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No. 73-755

In the Supreme Court of the United States

OCTOBER TERM, 1973

GEORGE CREIGHTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that language in the indictment that the defendants "did, or caused to be done" certain acts charged in connection with the allegations of fraud kept the indictment from providing adequate notice of the crime charged. Petitioner also contends that the indictment was fatally defective in that it charged him with illegally using the United States Postal Service, although the postal reorgani-

zation which created that agency had not been completed at the time of the alleged crime.

Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted on eighteen counts charging aiding and abetting mail fraud, in violation of 18 U.S.C. 1341 and 2. He was sentenced to a term of six years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. 18).

From September 1968 until February 15, 1971, petitioner, Ken Schultz and others were involved in a fraudulent scheme to sell car leasing franchises. In furtherance of the scheme, petitioner and his business associates organized Lease-A-Car, Inc., which purported to be a management corporation, and Lease-A-Car of Monroe, Inc. which sold franchises (Tr. 83-84, 852-858, 1034-1040).[1] Petitioner sent by mail materials containing false and misleading representations to induce members of the public to purchase the franchises. These materials fraudulently promised, *inter alia*, that one's average yearly earnings as a Lease-A-Car of Monroe, Inc. dealer should exceed $40,000; and that Lease-A-Car of Monroe, Inc. would perform numerous services for the franchise holders (Tr. 78).[2]

1. Petitioner argues that alternative allegations

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[1] "Tr." refers to the transcript of the trial proceedings.

[2] The allegations of fraud are set out in considerable detail in the indictment. See Pet. 13-16.

of the indictment, set forth in the disjunctive, did not properly inform him of the nature of the offense charged.[3]

However, criminal charges drawn under 18 U.S.C. 1341 setting forth allegations in the disjunctive have been consistently upheld as providing adequate notice of the offense alleged. See *Simons* v. *United States*, 119 F.2d 539, 547-548 (C.A. 9), certiorari denied, 314 U.S. 616; *Worthington* v. *United States*, 64 F.2d 936, 938 (C.A. 7); *United States* v. *Cafarelli*, 183 F. Supp. 734 (D. Utah). In an analogous situation in *Johnson* v. *United States*, 207 F.2d 314, 319-320 (C.A. 5), certiorari denied, 347 U.S. 938, the Court of Appeals for the Fifth Circuit, rejecting a claim that the defense had been "embarrassed by the use of the disjunctive," stated:

> There can be no valid contention that appellant's defense was embarrassed or that he was surprised by the evidence offered against him at the trial merely because the indictment alleged the prohibit[ed] character of the goods in the disjunctive rather than in the conjunctive. The indictment did not charge appellant in the alternative with having committed one or another of several offenses. He was charged with only one offense.

2. Petitioner also contends that the indictment was fatally defective because it charged that he used the United States Postal Service instead of the Post

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[3] These challenged allegations are set forth at Pet. App. 14-15.

Office Department, when the Service had not as yet been established by law. For there to be a prejudicial variance, however, the defendant "must establish not only that a variance between indictment and proof occurred, but that the variance 'affected the substantial rights of the parties.'" *United States* v. *Morado*, 454 F.2d 167, 170 (C.A. 5), certiorari denied, 406 U.S. 917. Here, there is no evidence that petitioner was misled by the alleged variance.

In *Hagner* v. *United States*, 285 U.S. 427, 433, where the indictment in a mail fraud prosecution failed to show jurisdiction in the trial court because it did not specifically allege that the defendants caused the letter "to be delivered by mail according to the direction thereon," this Court upheld the indictment:

> Omission from an indictment, drawn under the section of the Criminal Code now under consideration, of a specific allegation that the letter was "to be sent or delivered by the post office establishment" was not considered prejudicial where the indictment sufficiently alleged that the letter was placed in the post office properly addressed.[4]

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[4] In a related argument, petitioner contends that since the indictment charged the use of the Postal Service rather than

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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the Post Office Department, the trial judge's instruction to the jury that a conviction must rest on a prior finding that the Post Office Department's services were used was constitutionally impermissible. Not only did petitioner fail to object to the trial court's instruction at trial, but defense counsel complimented the court for having given "a superb instruction" (Excerpts of Proceedings, p. 112).

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